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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

12 United States of America,)
13 Plaintiff,) No. CR-95-320-PHX-RCB
14 vs.) O R D E R
15 Castulo Soto-Valdez,)
16 Defendant.)

)

18 Defendant *pro se*, Castulo Soto-Valdez, is serving a 360 month
19 sentence for a conviction, after a jury trial, for conspiring to
20 distribute and possess with intent to distribute methamphetamine.
21 Currently pending before the court is his "request to be provided
22 . . . access" to the "entire preexisting case file, including all
23 records and transcripts" in this case. Doc. (1310) at 1 and 2.
24 Preliminarily, defendant stresses that he is "not seeking a free
25 copy of the records and transcripts[.]" Id. at 1. Instead, he is
26 "seeking to review" the "already existing records and transcripts"
27 in this court's file. Id. Because he is incarcerated in Michigan,
28 defendant requests that the Clerk of the Court "retrieve" the

1 court's "entire preexisting . . . file[,] and send it via
2 "Certified Mail" to the Warden there. Id. at 2. At odds with his
3 earlier statement that he is not seeking a "free copy" of the
4 existing court file, later in his request defendant states that he
5 wants to be "allowed under supervision . . . to review, read and
6 photocopy" parts of that file which he "deems necessary" to prepare
7 a "motion for collateral relief." Id. at 3 (emphasis added).
8 Finally, defendant requests that he be provided access to the
9 court's file for "no less than . . . 45 days[,]" after which time
10 the Warden "shall return the records" via "Certified Mail[.]" Id.

11 In his request, defendant is not seeking *in forma pauperis*
12 status as 28 U.S.C. § 1915 allows. Defendant does claim to be
13 indigent and unable to "obtain access" to the court's file due to
14 his incarceration. Id. at 1, ¶ 3. Defendant further asserts that
15 his "trial lawyer does not have a copy of the records and
16 transcripts [in] this case." Id. at 1, ¶ 4. Similarly, defendant
17 claims that his former lawyer did not provide him with a copy of
18 those items. Id. at 1-2, ¶ 4.

19 **Procedural Background**

20 To place this request in context, a brief review of
21 defendant's litigation history is necessary. Following his
22 conviction and sentence, defendant appealed and the Ninth Circuit
23 affirmed. United States v. Soto-Valdez, 191 F.3d 462 (9th Cir.
24 1999). Just a few days prior to the issuance of that decision,
25 defendant filed a separate action to vacate/set aside his sentence
26 pursuant to 28 U.S.C. § 2255, Soto-Valdez v. Adams, 99-CV-01591
27 (doc. 1145). After denying that section 2255 motion, this court
28 entered judgment against defendant and dismissed the action (doc.

1 1211). Defendant promptly filed a notice of appeal with the Ninth
 2 Circuit (doc. 1212). Finding probable cause existed for
 3 defendant's appeal, this court allowed defendant to proceed *in*
 4 *forma pauperis* for appeal purposes only (doc. 1213). The court
 5 also issued a certificate of appealability solely as to the
 6 ineffective assistance of counsel claim, finding that defendant had
 7 made a substantial showing of the denial of a constitutional right
 8 in that regard. Id. Ultimately, the Ninth Circuit dismissed that
 9 appeal based on defendant's failure to file the opening brief.
 10 Doc. 1224.

11 Defendant acknowledges that the present request "is not a
 12 collateral attack upon [his] conviction or sentence." Id. at 1.
 13 Defendant asserts though that he needs access to the court's file
 14 to "perfect[] . . . a collateral attack raising an 'actual
 15 innocen[ce]' claim[,]" despite the fact that he has already filed a
 16 section 2255 motion which was unsuccessful.¹ Id. at 2, ¶ 5.

17 **Discussion**

18 Defendant Soto-Valdez does not indicate the statutory basis
 19 for his request to access the court's pre-existing file.
 20 Potentially, two statutes are applicable. The first is 28 U.S.C.
 21 § 753(f). Under that statute, a litigant who has been granted *in*
 22 *forma pauperis* ("IFP") status pursuant to section 1915 may file a
 23 motion to obtain a transcript at the government's expense upon a
 24 showing that his suit is "not frivolous and that the transcript is
 25

26 ¹ The court observes, without deciding, that in light of the foregoing,
 27 it may be that any subsequent habeas corpus petition which defendant files may be
 28 deemed a "second or successive" petition which the Anti-Terrorism and Effective
 Death Penalty Act generally prohibits. See 28 U.S.C. § 2244(b)(1) (West 2006).

1 needed to decide the issue presented by the suit[.]" 28 U.S.C.
2 § 753(f) (West 2006).

3 The second arguably applicable statute is 28 U.S.C. § 753(b).
4 In relevant part that statute requires:

5 The original notes or other original records and
6 the copy of the transcript in the office of the
7 clerk shall be open during office hours to inspection
by any person without charge.

8 28 U.S.C. § 753(b) (West 2006). Based upon this statute, the
9 Seventh Circuit in Rush v. United States, 559 F.2d 455 (7th Cir.
10 1977), held that incarcerated petitioners who had no counsel and
11 who were "collaterally challenging [their] underlying criminal
12 convictions" had "an absolute personal right to reasonable access
13 to the pre-existing files and records of their underlying case."
14 Rush, 559 F.2d at 458 (emphasis added).

15 "[U]nderscoring that the sought-after transcripts already
16 exist[ed][,]" the Rush Court reasoned that "[d]enying access to
17 court files to prisoners, given the statutory inspection rights
18 granted by 28 U.S.C. § 753(b), works an invidious discrimination"
19 in violation of the due process clause of the Fifth Amendment.
20 Rush, 559 F.2d at 459 (citation omitted). Denying unrepresented
21 prisoners access to court files is not "constitutionally harmless,"
22 the Seventh Circuit further explained, "[b]ecause a privately
23 retained counsel, under similar circumstances, when his client's
24 resources are not unlimited, would (most assuredly study the
25 record) for his client[.]" Id. (internal quotation marks and
26 citation omitted). Thus, "relying in part upon its supervisory
27 powers," the Rush Court "held that upon a proper application to
28 inspect a preexisting court record, the district court should mail

1 the record to a prisoner 'providing appropriate safeguards to
 2 maintain the record's integrity[.]" United States ex rel. Davidson
 3 v. Wilkinson, 618 F.2d 1215, 1217 (7th Cir. 1980) (quoting Rush,
 4 559 F.2d at 459 (footnote omitted). Indeed, the Rush Court
 5 sweepingly directed that "future requests for the pre-existing
 6 record in [an] underlying criminal proceeding should be *granted as*
 7 *of right by the district courts* to prisoners seeking to use the
 8 record to prepare a collateral attack on their conviction." Rush,
 9 559 F.2d at 459-460 (emphasis added).

10 In so holding, the Rush Court rejected the view that
 11 petitioners' *pro se* motion for verbatim transcripts at the
 12 government's expense was a section 753(f) request. According to
 13 the Seventh Circuit, petitioners' motion would not be construed as
 14 such because "no transcript fees would accrue because the 'records
 15 and files' sought [in] the underlying criminal case were already in
 16 existence." Rush, 559 F.2d at 458. The Seventh Circuit further
 17 reasoned that because "the district court could frank the record
 18 through the mails to one of the petitioners, no 'money appropriated
 19 for (the) purposes (of providing transcripts)' need be expended in
 20 providing the *original record* to [them][]" Id. (emphasis added)
 21 (footnotes omitted). In light of the foregoing, the Rush Court
 22 vacated the district court's denial of petitioner's motion insofar
 23 as it was premised upon section 753(f).

24 Pointedly noting that "[n]o other circuits have adopted the
 25 Seventh Circuit position [in Rush][,]" the Eighth Circuit in United
 26 States v. Losing, 601 F.2d 351 (8th Cir. 1979), declined to follow
 27 Rush. Id. at 353 (citation omitted). Rather, after Losing, the
 28 rule in the Eighth Circuit is, much like a transcript request

1 pursuant to section 753(f), that "under section 753(b), access to
 2 materials such as a transcript is not constitutionally required
 3 until after judicial certification that access is required to
 4 decide issues presented in a pending, non-frivolous case." Chapman
 5 v. United States, 55 F.3d 390, 391 (8th Cir. 1995) (citing United
 6 States v. Losing, 601 F.2d 351, 353 (8th Cir. 1979)).

7 Likewise, in Sistrunk v. United States, 992 F.2d 258 (10th
 8 Cir. 1993), the Tenth Circuit also declined to follow Rush. The
 9 Sistrunk Court began its analysis with United States v. MacCollom,
 10 426 U.S. 317, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976)). In MacCollom,
 11 the Supreme Court held that "an indigent defendant's right of equal
 12 access to procedures for review of his conviction was satisfied at
 13 the collateral relief stage by affording a defendant a free
 14 transcript upon a showing of a particularized need for the
 15 transcript as . . . § 753" requires. Id. at 259 (citations
 16 omitted). Recognizing that "some courts have held that the actual
 17 filing of a habeas petition is a necessary prerequisite[]" to
 18 complying with section 753(f), there was no need to resolve that
 19 issue in Sistrunk. Id. (citations omitted). Timing was not an
 20 issue there because the *pro se* prisoner did not satisfy section
 21 753(f)'s requirements in that he did not provide any factual
 22 allegations to support his ineffective assistance of counsel claim.
 23 Consequently, the Sistrunk Court held that the prisoner was not
 24 entitled to a free copy of his transcript under that statute. Id.

25 The fact that in Sistrunk the prisoner was requesting an
 26 existing transcript did not "compel[] a different conclusion." Id.
 27 "[D]isagree[ing]" with the Seventh Circuit that a "broad[] reading
 28 of § 753(b) was required to avoid constitutional problems," the

1 Sistrunk Court emphasized that in MacCollom the Supreme Court
2 "explicitly stated that a defendant's constitutional right of equal
3 access to the courts was satisfied by providing a defendant with a
4 copy of his transcript on direct appeal and did not require an
5 unconditional right to a transcript in collateral proceedings."
6 Id. at 260 (citing MacCollom, 426 U.S. at 326, 96 S.Ct. at 2092).

7 Moreover, in Sistrunk the Tenth Circuit astutely commented,
8 "even when furnishing pre-existing transcripts to prisoners[,] the
9 United States still incurs costs. Id. (citation and footnote
10 omitted). Acknowledging that those "costs may be less than those
11 required to be paid where a transcript has not yet been prepared,"
12 the Tenth Circuit observed that "§ 753(f) specifies no minimum
13 dollar amount as a prerequisite to its applicability." Id. The
14 Court further noted "that the fees referred to in § 753(f) include
15 copying and mailing costs." Id. at 260 n.5. It would be an
16 "absurd result[,]" the Sistrunk Court found, if pursuant to that
17 statute, "the United States could prepare transcripts for indigent
18 defendants but could not subsequently copy or mail them to the
19 defendant once they were prepared." Id. The Court posited that
20 the "clerk's office could . . . eliminate copying costs by sending
21 original transcripts to prisoners[]," which is what the Seventh
22 Circuit seems to require in Losing. See id. As the Sistrunk Court
23 astutely observed, however, that would be problematic. Not only
24 are there "concerns about preserving the transcripts," but the fact
25 remains that § 753(b) requires that the clerk's records be
26 available for public inspection." Id. The public's inspection
27 rights could be greatly hampered if original court files were
28 routinely sent to correctional facilities for prisoners' review. s

1 For all of these reasons, "[c]ontrary to the Seventh
 2 Circuit[]" in Rush, the Tenth Circuit in Sistrunk held "that
 3 § 753(f) is the *exclusive provision* governing requests by indigent
 4 prisoners for free transcripts, whether or not the transcripts
 5 already exist." Id. at 260 (emphasis added). Moreover, "before a
 6 defendant is entitled to a free transcript" pursuant to that
 7 statute, "he must make the particularized showing required"
 8 thereunder. Id.

9 Based upon Rush and its limited progeny within the Seventh
 10 Circuit, defendant Soto-Valdez contends that he is entitled to
 11 review the court's file in his criminal case and have photocopies
 12 of "relevant parts" provided free of charge to "prep[a]r[e] . . .
 13 his motion for collateral relief."² Mot. (doc. 1310) at 3. The
 14 court disagrees.

15 The Ninth Circuit has not yet had occasion to address the
 16 issue of whether § 753(b) or 753(f) governs a request such as
 17 defendant's. The Eighth Circuit in Losing, and the Tenth Circuit
 18 in Sistrunk have adopted what, in this court's view, is the sounder
 19 approach - from a legal as well as from a pragmatic standpoint. As
 20 discussed above, those courts found no constitutional harm in
 21 requiring a prisoner to comply with section 753(f) prior to being
 22 given access to even a pre-existing court file.

23 Broadly construing section 753(b)'s inspection rights, as the
 24 Seventh Circuit has, to require provision to prisoners of the
 25 "original record" would be unduly burdensome and costly. Provision

27 ² Evidently because the United States is not being asked to incur any
 28 expenses in connection with defendant's request, it did not file a response hereto.

1 of the "original record" could jeopardize the inspection rights of
2 others under section 753(b), not to mention potentially
3 compromising the integrity of the original court record. Granting
4 prisoners access to the original record also would be complicated
5 by multi-defendant cases where several prisoners are
6 simultaneously, or nearly so, demanding access to the same original
7 record.

8 Avoiding the difficulties inherent in providing such access to
9 prisoners would, despite the Seventh Circuit's contrary assumption,
10 result in additional cost to the United States. Mailing aside,
11 copying costs would be incurred because it would be extremely
12 difficult to maintain the integrity of the court's file if
13 originals were routinely sent to correctional facilities. All of
14 these reasons convince the court that an incarcerated individual,
15 such as Mr. Soto-Valdez, must "make the particularized showing
16 required by [28 U.S.C. § 753(f)]," before he will be entitled to
17 obtain access to even a pre-existing court file. See Sistrunk, 992
18 F.2d at 260. More specifically, such litigants must show that
19 their suit is "not frivolous and that the transcript is needed to
20 decide the issue presented by the suit[.]" 28 U.S.C. § 753(f).
21 Section 753(b) does not provide such litigants with a separate,
22 independent right of access to the court's original file.

23 Having found that section 753(f) rather than section 753(b)
24 governs defendant's request herein, the court must next consider
25 whether he has complied with the former statute. As a prerequisite
26 to qualifying for a free transcript under that statute, a litigant
27 must be certified to proceed IFP under section 1915(a). On this
28 sparse record, defendant Soto-Valdez does not meet the economic

1 eligibility requirement of that statute. There is no "affidavit
2 that includes a statement of all assets [he] possesses [showing]
3 that the person is unable to pay such fees or give security
4 therefor." 28 U.S.C. § 1915(a)(1) (West 2006). Nor has defendant
5 Soto-Valdez provided a certified copy of his prisoner trust fund
6 account for the preceding six months, as section 1915(a)(2)
7 mandates.

8 In addition, there is no showing on this record that the
9 actual innocence claim which defendant eventually wants to file is
10 "not frivolous and that the transcript is needed to decide the
11 issue[s] presented by" such a claim. See 28 U.S.C. § 753(f). The
12 mere bald assertion of "actual innocence," with no supporting
13 factual allegations does not satisfy section 753(f). See Sistrunk,
14 992 F.2d at 259 (affirming denial of transcript request under
15 § 753(f) where petitioner made only conclusory allegations that he
16 was denied ineffective assistance of counsel); see also United
17 States v. Falu-Mendoza, 2007 WL 2239403, at *1 (S.D.Cal. Aug. 3,
18 2007) (denying motion for sentencing hearing transcripts due to the
19 "limited information provided in Defendant's motion[,]" so that
20 "Court [could] not determine whether his [§ 2255] petition w[ould]
21 be frivolous or whether a transcript w[ould] be needed to decide
22 the issues presented [there]in["]); and Morgan v. Doran, 2007 WL
23 1080580, at *2 (E.D.Cal. April 4, 2007) (denying request for
24 preparation of transcripts at government's expense where motion
25 "provide[d] insufficient information . . . to determine whether
26 . . . case [wa]s one in which limited government resources should
27 be spent on the preparation of transcripts[,]" and where plaintiff
28 "merely list[ed] all proceedings in . . . case" and did not

1 identify "specific issues he wishe[d] to appeal").

2 Finally, even if defendant Soto-Valdez had met section
3 753(f)'s standards, still, he would not be entitled to access to
4 the court's file under that section because his request is
5 premature. "The vast majority of courts," have interpreted section
6 753(f) "to mean that, until a prisoner actually brings a proceeding
7 under section 2255, he is not entitled under § 753(f) to have costs
8 for creating or copying such transcripts or other documents paid by
9 the United States." United States v. Lucatero, 2007 WL 1747077, at
10 *1 (E.D.Cal. June 18, 2007) (citations omitted); accord United
11 States v. Connors, 904 F.2d 535, 536 (9th Cir. 1990) (citation
12 omitted) (indigent prisoner who had not filed a habeas petition,
13 was not entitled to copies of his trial transcript at government
14 expense under 28 U.S.C. 2250 until the filing of such a petition).

15 In the present case, defendant is apparently contemplating
16 bringing a section 2255 motion in the future based upon an asserted
17 claim of actual innocence. Under these circumstances, his
18 constitutional right of access to the courts is not implicated.
19 See Hansen v. United States, 956 F.2d 245, 248 (11th Cir. 1992)
20 (prisoner's right of access to court files of underlying criminal
21 proceedings does not "extend[] to access to the records for the
22 purpose of *preparing* a collateral attack on a conviction[;] . . . a
23 request by a prisoner for access to the court files of his
24 underlying criminal conviction is premature prior to the filing of
25 a collateral attack on that conviction[]"). The court is keenly
26 aware that at least the Fourth Circuit has "ruled that under
27 special circumstances it is permissible to consider a motion for
28 free transcripts prior to the filing of a § 2255 petition, if

1 necessary for use therein." Lucatero, 2007 WL 174077, at *2
2 (citing United States v. Shoaf, 341 F.2d 832 (4th Cir. 1964)). As
3 did the court in Lucatero, "this court is unwilling to circumvent
4 the clear language of § 735(f) to promote a policy which would
5 encourage fishing expeditions and other possible abuses." See id.
6 This rationale is all the more compelling where, as here, defendant
7 has already filed one section 2255 motion.

Conclusion

9 For the reasons set forth herein, IT IS ORDERED that defendant
10 Castulo Soto-Valdez's "Request to be Provided with Access to
11 Information Contained in the Preexisting Original Records Contained
12 in the Files of the United States District Court" (doc. 1310) is
13 DENIED.

14 || DATED this 11th day of May, 2009.

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18 Robert C. Broomfield
Senior United States District Judge

23 | Copies to counsel of record and defendant *pro se*